United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1421

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JACK NATHAN,
Appellant

On Appeal from the United States District Court for the Southern District of New York

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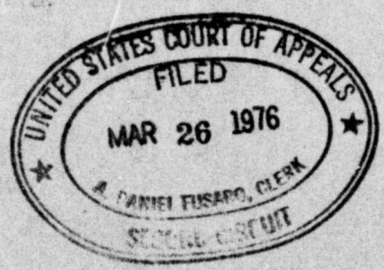

NATHAN LEWIN
JAMIE S. GORELICK
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Appellant

BEACON PRINTING COMPANY • WASHINGTON, D. C. • (202) 293-7160

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IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

The prosecution's brief on this appeal is extraordinary not for the subjects it discusses, but for those it fails to discuss. This Court has before it the record of a short trial (in which the presentation of proof took three trial days) with an unusually large number of serious errors bearing directly on the ultimate issue of guilt or innocence: (1) The trial judge failed, notwithstanding explicit defense requests on two separate occasions, to instruct the jury on a theory of defense

amply substantiated by the proof and (as the prosecution itself has noted) by counsel's argument to the jury; (2) the trial judge precipitously cut off cross-examination of an important government witness with respect to highly probative impeaching evidence consisting of a tape recording of a part of the witness' conversation with the defendant; (3) the trial judge failed to give the jury a cautionary instruction on the limited use it might make of oversized charts (of dubious relevance) which the prosecution had introduced--notwithstanding general agreement that such an instruction had to be given; (4) the jury was confused as to its proper role and was permitted to return a partial verdict before its deliberations terminated and before it had arrived at any consensus. As to each of these points--as well as with respect to other trial errors and the inadequacy of the proof--our brief cited and discussed this Court's decisions which establish, we submit, that each error, even if taken singly, requires reversal. The prosecution's brief--weightier in the small-type asides which appear in its margin than in its bold-face argument--totally ignores these decisions and argues each of the points as if there were no announced law in this Circuit on each subject.

1. We begin with the trial judge's failure to instruct the jury, along the lines of Defendant's Requested Charges 10 and 11, that if cash obtained by Mr. Nathan was used to provide gratuities to credit managers or others whose good will was needed to assure "a continued flow of business from his clients" (see our Main Brief, pp. 59-60), he could not be found guilty of tax evasion in this respect. The governing rule of law was clearly and unequivocally stated by this Court in United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956), and quoted approvingly and applied in United States v. Platt, 435 F.2d 789, 792 (2d Cir. 1970) (emphasis added):

> A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.

The evidence here was hardly "weak or incredible." There was substantial proof, from a prosecution witness, that cash payoffs were virtually obligatory in the business. There was, in addition, the inference to be drawn from the pattern (shown by the exhibits reproduced between pp. 47 and 48 of our Main Brief) that the cashed checks were usually drawn and negotiated at the same time that a refund was being made to Mr. Nathan's client.

The prosecution's brief fails to discuss, or even to cite, O'Connor and Platt. Instead, the prosecution cites two cases--United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), and United States v. Gross, 286 F.2d 59 (2d Cir. 1961)--in which no evidence whatever was introduced to support what was later claimed to be a defense theory. The inapplicability of those decisions is demonstrated by the prosecution's own assertions (at p. 20 of its brief) that the defense on which the judge refused to give an instruction had been

(1) "emphasized . . . [in the defense] summation,"

(2) "argued . . . [on] circumstantial proof" by the prosecution; and

(3) reflected on adversely by the trial judge in his original and supplemental charges.

Given this ample discussion of the theory of defense at trial, the jury could only have concluded from its omission during the final charge (and in the response to its pointed inquiry) that it was not a legal defense. That erroneous inference may well have resulted in the guilty verdict.

2. We turn next to the question of the impeaching tape recording. Here the relevant cases--discussed in our brief but not considered worthy of mention in the prosecution's--are United States v. Barash, 365 F.2d 395, 400-401 (2d Cir. 1966), and United States v. McKeever, 271 F.2d 669, 675-676 (2d Cir. 1959). The prosecution understandably would prefer to ignore what these decisions say because they demonstrate the clear error of the trial judge's rulings on this critical evidentiary question.

McKeever presented a situation strikingly similar to the one at bar. In that case, a prosecution witness had had a post-indictment conversation with the defendant which the defendant had secretly recorded. Only 16 minutes of the 43-minute conversation were clear enough "to be heard and understood." Nonetheless, the trial court permitted the tape to be played to the witness in open court over earphones, and counsel was permitted to read to the jury a transcript of the recording containing the witness' impeaching remarks. This Court approved that procedure and held that the late Judge Herlands had shown "patience and diligence" in dealing with the proferred proof in a manner that protected the rights of the defendant and the government. 271 F.2d at 676. The Court held that it was not necessary to play the full tape in the presence of the jury

because--and only because--the conversation contained "so many self-serving statements by the defendant McKeever that it is doubtful whether any instruction by the trial judge that the jury should not consider McKeever's taped statements as bearing on the truth or falsity of his defense would have been adequate to prevent such consideration." 271 F.2d at 676.

The critical point for present purposes is that in McKeever defense counsel was permitted to use the witness' taped statements for impeachment purposes and to expose the inconsistency between those statements and the witness' testimony at trial. Here, by contrast, the court foreclosed the use of the impeaching statements altogether, even though the case for permitting the free use of the tapes was even stronger than in McKeever. Unlike the tape in McKeever, the tape in this case was "clear enough," as the judge himself observed (A. 207). Nor was the recording here infected with the series of self-serving statements that characterized the McKeever tape. After hearing the tape, Judge Bonsal was willing to have it played, but the prosecutor said he "would like to hear the beginning of the conversation first" (ibid.). At that point, the judge said, "We are going to waste a lot of time on this," and instructed defense counsel to find the beginning of the

conversation (A. 208). When it was not found, the judge excluded the use of the tape at that time altogether, and further manifested his impatience by interrupting defense counsel's explanation of how the conversation started (A. 210), and his statement that he would not question the witness any further (A. 211). The record thus reflects not "patience and diligence" in handling the tape, as was the case in McKeever, but rather impatience and disregard for the powerful potential impeaching effect of the recording. Nor is the impact of this ruling on the jury's verdict just a subject of speculation; during its deliberations the jury vainly asked to hear the tape (A. 623).

If McKeever left any doubt, Barash laid it to rest. Impeachment by playing to the prosecution witness a recording of his own voice contradicting what he has said, under oath, in open court is an extraordinarily important means of communicating to the jury that the witness "having lied on one subject, . . . had lied on all." 365 F.2d at 401. This Court said in Barash that improperly curtailing cross-examination on this issue would "surely" warrant reversal even of a major conviction on many counts following a long trial, and even if the contradiction related to a "collateral" matter not directly relevant to guilt or innocence.

In this case, the contradiction related to the reason why Groppe had received money from Mr. Nathan, at one time by check and, it could be inferred, more recently in cash. This was critically important to the defense theory that credit managers had been receiving cash gratuities as a matter of ordinary business practice. To say, as the trial judge did and the prosecution now maintains, that the contents of the tape recording could have been explored "through other means" subverts the right of confrontation which effective cross-examination ensures. As any experienced trial lawyer would know, counsel's ability to secure from Groppe an admission that he had been receiving cash gifts from Mr. Nathan diminished substantially after Groppe had the chance to reflect on the fact that his conversation with Mr. Nathan had been recorded and to concoct an explanation for his inconsistent statements. Even if the trial judge had permitted Groppe to be recalled on the following day, as the prosecution urged (apparently because it was concerned over his ruling),[1] such a belated recognition

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1/ In fact, the judge indicated that he was rejecting the prosecution's proposal that Groppe be permitted to return to the stand because he did not see "what relevance [the tape] . . . has" (A. 563). The prosecution's brief criticizes the defense for declining "the invitation to question Groppe further following the Court's initial ruling" (Prosecution's Brief, p. 26), but fails to mention that the "invitation" was issued by the prosecution and not by the only one who had authority to tender such hospitality, the trial judge.

would not have cured the error. And the opportunity actually given to the defense by the judge, to introduce the tape recording as part of the defense case, if the beginning of the conversation were found, would have been virtually meaningless.

3. The prosecution is hardly in a position to take issue with our contention that a cautionary instruction should have been given to the jury with regard to the mammoth prosecution charts, since even the prosecutor requested such a concluding charge (A. 700).[2/] The trial judge did not give it, and the prosecution is now reduced to arguing that the judge's offhand comment that one of the four exhibits was "merely a chart" and that "[t]he checks themselves are the evidence, the chart is merely to help you as a pictorial representation" were adequate substitutes for the requisite cautionary language (Prosecution's Brief, pp. 27-28). The necessary caution is not conveyed simply by using the word "merely" to describe the charts. As both the defense and prosecution requests indicated, the jury should have been told--with respect to all charts--that the exhibits (1) were summaries, (2) could not be considered as

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2/ The prosecution states erroneously that we make "no claim here" that the charts were erroneous. In fact, we do make such a claim (our Main Brief, p. 63 n.24), but we recognize that it was not asserted below. We believe this was due, in part, to the fact that defense counsel was not shown the charts in advance (A. 498).

independent evidence, (3) could be accepted only if they correctly reflected the underlying documents, and (4) were no better than the testimony or documents which they purported to summarize (A. 695, 700). What the trial judge actually told the jury failed to communicate most of these warnings. Virtually all reported decisions in which charts have been permitted have emphasized the trial judge's obligation to give "careful" instructions to the jury. See cases collected at 16 A.L.R. Fed. 542, 554-557. Here there was barely any instruction at all--much less a "careful" one.

4. The jury's confusion--outlined briefly in the concluding footnote of our main brief--resulted in an irrational partial verdict, generated by the trial judge's premature inquiry, which had been suggested by the prosecutor, as to whether the jury had reached a verdict on any of the counts. The prosecution erroneously states that there was no objection to the taking of the partial verdict when, in fact, the record clearly reflects that defense counsel did not agree with the judge's inquiry and was interrupted in the middle of his statement of the reasons for his objection (A. 632). In fact, Mr. Nathan himself objected, on the record, to this procedure (ibid.). The prosecution's observation that Rule 31(b) of the Federal

Rules of Criminal Procedure applies only to cases involving multiple defendants reinforces our position that there is absolutely no authority, in a single-defendant case, for taking a verdict on some counts in the middle of the jury's deliberation.

The confusion surrounding the jury's deliberations and its verdict is reminiscent of the situation in United States v. Zeehandelaar, 498 F.2d 352 (2d Cir. 1974), in which this Court recently reversed a criminal conviction growing out of an equally short jury trial because of the court's conclusion that the defendant had not "had a fair trial." In this case, as in that one, the evidence of guilt is slim, and in this case there were an extraordinary number of serious trial errors (far more than in Zeehandelaar) that affected the jury's ability to make a dispassionate judgment of guilt or innocence.

We have not discussed, in this short brief, the matter of the trial judge's partisanship because we believe that the full picture can best emerge not from descriptive terms used by counsel but from this Court's examination of the record, and particularly the illustrations cited in our Main Brief (pp. 68-70) and in our Appendix IV (pp. A. 7 to A. 16). We are, however, surprised that the prosecution characterizes as "wholly accurate" the trial judge's remark in the jury's

presence to Edwards--the principal prosecution witness--that he had been discharged by Mr. Nathan because Mr. Nathan "didn't want to go along with your accounting ideas" (Brief, p. 30). In view of the following response given by Edwards on cross-examination (amplified by Katz' testimony), that conclusion as to the reason for Edwards' discharge was, at the least, highly partisan (A. 155):

> Q: Didn't Mr. Nathan tell you he was dissatisfied because you were using juniors instead of yourself, that you were asking for extensions contrary to his wishes when he wanted the returns in on time.
>
> A. He could have told me that, yes, sir.

The judge's comment was all the more astounding in view of the fact that immediately prior to the above question and answer the judge had, sua sponte, prevented defense counsel from asking Edwards why he had been discharged (A. 154):

> Q. [by Mr. Bender] He told you that you had sufficient information to prepare proper returns, didn't he, and that you shouldn't ask for an extension?
>
> A. I told him we could --
>
> THE COURT: Did he tell you that you had sufficient information and should not ask for an extension?
>
> THE WITNESS: I don't recall.

Q. And isn't that the reason why he let you go, because --

THE COURT: I don't know if he knows why he was let go.

Q. Isn't that the reason why he told you, you were not to continue when --

THE COURT: Wait a minute, please. I don't know if he knows what is in his mind.

How could the trial judge have been "accurately" conveying to the jury the conclusion that Edwards was discharged because Mr. Nathan did not go along "with [his] accounting ideas" if it was the judge who had prevented Edwards from testifying on cross-examination why he was discharged, explaining his sua sponte ruling on the grounds that Edwards could not know "why he was let go" and did not know what was in Mr. Nathan's mind?

The sufficiency of the evidence to establish culpable knowledge is also best treated by a full evaluation of the proof, but we cannot close this short reply brief without responding to at least some of the most egregious assertions made in the text and margin of the prosecution's brief:

First, the prosecution's description of evidence as "direct" and "circumstantial" is singular. The prosecution concedes grudgingly that its proof with respect to the cashed

checks was "primarily circumstantial" (Brief, p. 12),[3/] but asserts that the testimony of Allan Edwards was "direct evidence" of culpability on the matter of the unnegotiated checks. Apart from the obvious fact that Edwards testified only about the situation in early 1966--a year not involved in this indictment--even a cursory reading of Edward's testimony demonstrates that he did not remotely suggest, during his brief tenure as Mr. Nathan's accountant, that retaining old checks on the books might amount to tax fraud. In his testimony Edwards related his advice regarding the stale checks to the fact that, as of December 31, 1965, the firm's checking account showed an overdraft--apparently because "a great many checks" were written in December. He said that he had told Mr. Nathan that "[s]ince there was a cash overdraft, the government would not allow the amount of expenses to the extent of that overdraft . . . ." (A. 112, emphasis added). In fact, the contemporaneous letter allegedly written by Edwards to Mr. Nathan made no mention of the "stale" checks; it spoke only of the "cash overdraft as at the end of 1965" and explained that "upon audit,

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3/ We believe, of course, that it was not even circumstantial--that it was no more probative of guilt than of innocence.

the government might disallow same" (A. 653). This sounds like a very weak caution as to the possible civil consequences of the firm's temporary negative bank balance. It was surely not "direct evidence" of the willfulness required for criminal tax evasion.

Second, the prosecution's discussion of the evidence also pointedly omits any reference to the substantial exculpatory testimony given by Sanford Katz, the accountant who actually drew up the returns which were allegedly false. From reading the prosecution's summary (Brief, pp. 5-7), one would suppose that Katz' testimony incriminated Mr. Nathan; in fact, it did just the opposite. The prosecution's case rested, in large part, on its effort to persuade the jury that Katz--the prosecution's own witness--was lying when he personally took the blame for both sets of erroneous entries. The undisputed proof, however, corroborated Katz' account that his own family problems caused him to fall far behind in his work, to lie to and conceal facts from Mr. Nathan, and to do his bookkeeping and accounting work in a sloppy and careless fashion. There was, moreover, no question whatever as to the standard operating procedure in Mr. Nathan's place of business--i.e., all bookkeeping and accounting work was left, from the first to the last detail, to the accountant hired to do the firm's work.

Katz' testimony squarely refuted the prosecution's assertion that Mr. Nathan "saw to it that the improper practices continued unchanged" (Prosecution Brief, p. 15). Katz testified, as set out fully at pp. 18-20 of our Main Brief, that he had independently followed the prior accountant's practice, and only mentioned the matter on one brief occasion to Mr. Nathan. Although the prosecution would like to equate knowledge by Mr. Nathan that the checks were not written off with the culpable intent required for tax evasion, it is clear from United States v. Pechenik, 236 F.2d 844 (3d Cir. 1956), that the equation cannot stand. The defendant in Pechenik was "aware" of what his accountant had done in writing capital items off as current expenses,[4/] but the Court of Appeals ruled that this knowledge did not establish that the defendant "understood

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4/ The Court said in Pechenik, 236 F.2d at 847:

> The government places heavy reliance upon the claim that at one time the defendant told a bank official visiting the premises in connection with a contemplated loan that the cost of a warehouse had been charged off as an expense.

the procedures employed by the bookkeeper and accountant were inadequate and erroneous." 236 F.2d at 847.[5/]

CONCLUSION

For the foregoing reasons, as well as those more fully set out in our Main Brief, the judgment below should be reversed with instructions to enter a judgment of acquittal. Alternatively, the judgment below should be reversed and the case remanded for a new trial.

5/ The prosecution also continues to substitute inflammatory adjectives for proof when it asserts that Pechenik is distinguishable because Mr. Nathan "personally executed the clandestine check-cashing scheme" (Prosecution Brief, p. 15; italics on the original). There was nothing "clandestine" about the procedure, and it does not become a "scheme" merely because the prosecution chooses to call it that. Of course, Mr. Nathan "personally" cashed the checks, just as Mr. Pechenik was "personally" involved, as the chief corporate officer, in buying the capital items which were improperly charged as current expenses on the books. The relevant question in both cases is not who participated in the underlying business transaction, but who decided how the transaction was to be reflected on the books of account. Katz' testimony--set out in full at pp. 25-28 of our Main Brief--establishes that Mr. Nathan was not responsible in any way for that decision, just as Mr. Pechenik had not been responsible for what his accountant and his bookkeeper did with the information he gave to them.

Respectfully submitted,

NATHAN LEWIN
JAMIE S. GORELICK
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 1976 a copy of the "Motion for Leave to File Reply Brief Less than Three Days Before Argument" was served by hand delivery to:

Frank Wohl, Esquire
Office of the
United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

NATHAN LEWIN

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S. Hoerchs
Deputy clerk

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MAR 23 1976
ROBERT B. FISKE, JR.
U.S. ATTORNEY
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New York, New York 10007

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Deputy Clerk

NATHAN LEWIN

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Robert B. Fiske Jr.
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